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In The

Supreme Court of the United States

October Term, 1970

No. 1263

THE NEW YORK STOCK EXCHANGE,
Petitioner,

vs.

THILL SECURITIES CORPORATION, ETC.,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent in its brief in opposition chooses not to recognize and does not address itself to the sole question presented by the petition for certiorari.

The single issue as to which review is sought is whether the Exchange's antirebate rule as such—which is an integral part of the minimum commission rule and does not prevent members from dealing with nonmembers—is immune from antitrust attack since the rule is within the Exchange's self-regulatory duties and subject to the review and revisory jurisdiction of the SEC under the Exchange Act. Respondent completely ignores the fact that this issue presents the "different case" specifically recognized but left open in *Silver*.

Instead, in an attempt to postpone or avoid consideration by this Court of the nationally important issue presented, respondent distorts the *Silver* rationale and dwells upon issues not raised by the petition.

1. *Respondent's distortion of the* Silver *rationale*

While characterizing the antirebate rule as a concerted refusal to deal or boycott (brief, pp. 2, 10), respondent nowhere contends that the Exchange's antirebate rule is not within the SEC's review jurisdiction, and indeed its brief implicitly concedes that it is (brief, pp. 12, 15). Such review power is based on § 19(b)(9) of the Exchange Act, 15 U.S.C. §78s(b), which authorizes the SEC to review and revise Exchange rules in respect of the fixing of reasonable rates of commission.

Nevertheless, in an effort to make it appear that this is not the "different case" posited in *Silver* but is encompassed within the *Silver* rationale respondent advances two arguments, each of which is fallacious.

It is argued (brief, p. 11) that since *Silver* assumed that the SEC could but did not require the Exchange to adopt a procedural rule, the adoption of such a rule by an antitrust court would not be incompatible with the existence of the SEC's power. Whether or not this reading of *Silver* is correct, it is clear that the power of the SEC to require the Exchange to adopt procedural rules is by no means coextensive with, and is obviously something quite different from, the SEC's power to itself review and revise the Exchange's substantive rules. Review by an antitrust court of substantive Exchange rules which are subject to the SEC's revisory jurisdiction obviously is incompatible with

the SEC's discharge of the regulatory powers vested in it by the Act.

It is also suggested (brief, p. 12) that the *Silver* decision turned on a "lack of positive action by the SEC" with respect to the Exchange's activity there challenged. It is entirely clear from the opinion, however, that it was not the absence of SEC exercise of authority but rather the lack of authority itself which was the touchstone of the decision that the application of antitrust principles by a court would not be incompatible with agency power. Otherwise, the Court's reiterated observation that if such review jurisdiction existed it would pose a "different case" would have been meaningless.

2. *The need for immediate review*

Review at this time would not be premature merely because there may exist other issues not raised by the petition for certiorari (brief, p. 12). These issues were held by Judge Campbell to be "additional issues" which were "apart from the antirebate rule" (App. p. A-24). Resolution of the single issue of law presented by the petition is in no wise dependent upon the resolution of such additional issues. In view of the national importance and urgency of the principal issue, and its presence in other pending cases, its consideration by this Court should not be deferred.

Whether "extremely remote" (brief, p. 15) or not, the possibility of the SEC and the District Court arriving at different conclusions concerning the propriety of the antirebate rule does exist, emphasizing the potential conflict with the SEC's current exercise of the jurisdiction granted it by Congress in the Exchange Act.

Nor is the dilemma posed in the petition (pp. 13, 14) resolved by respondent's suggestion (brief, pp. 13, 14) that the antitrust validity of self-regulatory rules should be judged under the rule of reason. Potential liability under the Exchange Act still remains for a failure to regulate adequately or at all, as well as the constant threat of treble damage liability inherent in the uncertain boundaries of the rule of reason.

Respectfully submitted,

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